No. 14,924

United States Court of Appeals

For the Ninth Circuit

MARY EDITH DAULTON, Administratrix of the Estate of Donald LeRoy Daulton, deceased,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,

Appellee.

APPELLANT'S REPLY BRIEF.

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ARGUMENT.

We first would like to clarify the following statement appearing at page 16 of Appellee's Reply Brief.

> "If appellant wished the jury to be given certain instructions she had the privilege of requesting them pursuant to Rule 51 of the Federal Rules of Civil Procedure. *Appellant requested no instructions* * * *."

Both Appellant and Appellee requested a full set of instructions and all were rejected by the Trial Court.

> "According to the Civil Rules I am supposed to give you an idea as to what I will do with the requested instructions. I hereby reject them all."
>
> (P.T. page 148)

The exceptions taken to the instructions on contributory negligence, were directed to the point that, such instructions as given by the Court, permitted the jury to find that a want of due care upon the part of deceased would defeat a recovery by the plaintiff. If it was addressed only to the question of damages, although erroneous, the probability would be that they would not constitute reversible error. But, where, as here, they would prevent a recovery such erroneous instructions were highly prejudicial.

The Court instructed:

> "But you must remember that if Daulton was solely at fault, and no negligence on the part of the railroad contributed to his death, then you would not permit any recovery at all and you would not arrive at any consideration of damages."
>
> (P.T. page 174)

Plaintiff's exception was clearly directed at this specific point.

> "The Court. Any exceptions, Gentlemen?
>
> Mr. Brobst. There is only one, your Honor. That was the question of the instruction on contributory negligence. I believe under the circumstances, where the law conclusively presumes that the plaintiff was in the exercise of ordinary care, there being no evidence in the record to the contrary or that he did any act that could be construed as an act of contributory negligence, the instruction should not have been given.
>
> The Court. I don't know what the jury is going to find about that. If I went into the question of negligence on either side and had not

gone into that, I would think I was not following the rule that is laid down for me. I think (157) that applies to contributory negligence just as much as it does to negligence. The Supreme Court, as I understand it, has said these are jury questions, and I am going to submit both of them.

Mr. Brobst. I just read one case the other day where that instruction was given, and the Court said it should not have been given because there was no actual eye-witness to the accident, and in view of those facts it was conclusively presumed that he was in the exercise of ordinary care.

The Court. I think it is conclusively presumed, also, that the employes of the railroad are in the exercise of ordinary care. I won't give it, anyhow. I think these are jury questions; and if you are going to submit one side, you have to submit the other."

It was apparent from the statement of the Court that there would be no change in the instructions. The whole argument of counsel was to the effect that the deceased could not be charged with negligence in the absence of witnesses to his conduct. There was no act shown in the evidence that was done or committed by the deceased that could possibly charge him with a want of care.

He did not have a choice of a place to ride. The engineer, as well as the conductor who was in charge of the train, stationed the crew members.

"Q. (Mr. Biwer, train conductor) Who has charge of the train in a movement of that kind?

A. The conductor jointly with the engineer.

Q. What would be the purpose of Mr. Daulton being out on the front footboard of that engine?

A. Well, piloting by the welders that was working there in case they didn't have their equipment off the track, and also to let him into the siding."

(P.T. pages 51 and 52)

"Q. (Mr. Rutledge) Who stations the men, tells them where to be on the train as the movement is being made?

A. The conductor."

(P.T. page 59)

"Q. (Mr. Zimmerman) Who has control of the position of the men on a train when a move of that kind is being made?

A. Well, the engineer would have up on the head end."

(P.T. page 79)

"(Thomas C. Warmack)

Q. What would be the reason for a brakeman to be out on the front footboard of the engine?

A. Well, I wouldn't know of any under that circumstance.

Q. Where does he ride if he has no duty to perform, the head brakeman?

A. In the engine.

Q. Who is the one that is to tell him where to ride?

A. Usually the one which is closest to him, which is the engineer, notwithstanding the fact that the conductor has the authority to place his men any place he so desires.

Q. But the usual thing is whoever is closest to him normally does it; is that right?

A. If he is assigned to the head end, then ordinarily he abides by the engineer's instructions while around the engine." (67)

(P.T. page 98)

This testimony is all that is in the record on the subject, and it definitely establishes that the placing of the crew members was controlled by the conductor or engineer, and here the conductor testified that the deceased was on the footboard, "piloting by the welders that was working there in case they didn't have their equipment off the track, and also to let him in the siding".

Under the evidence there was no fact or testimony that could sustain a finding of negligence upon the part of the deceased. Yet, under the instructions as given and excepted to and in face of the presumption that deceased was in the exercise of ordinary care, the jury may have erroneously found that the accident was the result of deceased's negligence or fault. The jury should have been told as plaintiff urged that there could be no fault found upon the part of the deceased, and that it was error to instruct that the contributory negligence or fault of deceased would defeat a recovery.

The question is not whether there was no fault upon the part of the defendant, but whether the Court erroneously advised the jury that they could find negligence upon the part of the deceased that would prevent a recovery contrary to the presumption of due care. That was the exception urged against the errror made by the Court in so instructing.

CASES RELIED UPON BY APPELLEE.

The cases relied upon by the appellee are not in point here.

In *Kansas City Southern Ry. Co. v. Jones,* 276 U.S. 303, 72 L.Ed. 583, there was no evidence of negligence upon the part of the defendant, and no evidence that deceased was where he should have been or that he was performing his duties. Here, there is evidence that deceased was piloting the train past welders, and that he was placed on the front of the locomotive either by the conductor or engineer, and there was evidence of negligence upon the part of the defendant for failure to stop when the deceased went out of view of the engineer.

Kansas City Southern Ry. Co. v. Jones, 241 U.S. 181, 66 L.Ed. 943, held simply that under general pleading defendant could show contributory negligence. There was no pretrial order, as here, where the issues are framed for the very purpose of eliminating such questions. If the question only went to diminution of damages that would be one thing, but here the erroneous instructions permitted the jury to find negligence upon the part of deceased to defeat a recovery. Under such instructions, the negligence of the deceased was made a defense, to be made an issue and to be established affirmatively by a preponderance of evidence.

The same criticism applies to the case of *Gray v. Pennsylvania R. Co.,* 71 F. Supp. 683 (S.D. N.Y. 1946). There was no pretrial order to frame the issues. This case was purely a question of pleading and did not involve a fact situation where the plain-

tiff was entitled to a presumption that the deceased exercised due care, and then an instruction being given that permitted the jury to find a want of due care to defeat a recovery.

Again, in *Dow v. United States Steel Corp.,* 195 F. 2d 478 (3 Cir. 1952), the instruction only went to the question of reduction of damages and was not prejudicial. Here, the instruction went to the heart of the case, the right to recover. This same distinction applies to *Tracy v. Terminal R. Ass'n of St. Louis,* 170 Fed. 2d 635 (8 Cir. 1948).

RESTRICTION OF ARGUMENT.

Appellee does not reach the point urged by appellant. There was no suggestion upon the part of counsel that any law was to be read to the jury, and there was no intent upon the part of counsel to do so. The only point was that in arguing the case for plaintiff, counsel desired to correlate the facts with the law, so that a logical presentation could be made to the jury. The law as pointed out in appellant's opening brief sanctions and approves such procedure.

This was denied, and the Court was informed that argument upon the part of the appellant had been taken away by the Court.

> "The Court. You will have to leave that to me.
> Mr. Brobst. That is what I want to know. You are taking all my argument away from me."
> (P.T. pages 114 and 115)

Certainly, as pointed out in the opening brief of appellant the right to apply the facts to the applicable

law in argument is not disputable. The Court under Section 51 of the Federal Rules of Civil Procedure should have advised counsel as to the nature of the instruction so an intelligent argument could have been made. There is no question but what reading of statutes or misstating the law would be improper. But if such attempt was made it could have been stopped at the time, but to deny counsel the right to present the facts in the light of the law was certainly prejudicial.

COMMENTS OF TRIAL COURT.

Although the testimony that was commented upon by the Trial Court may have been cumulative, it nevertheless cast a shadow upon the case of the plaintiff and her witnesses. The jury may have felt that other witnesses who had the same experience were subject to the same criticism. The effect of other portions of his testimony not cumulative may have been affected. The error of the Trial Court in this connection is apparently admitted, but is sought to be explained away upon the theory that the testimony of the witness was cumulative. However, how much of his other testimony was destroyed by the comment is a matter of conjecture.

CONCLUSION.

There was ample evidence in the record to sustain a judgment for plaintiff had the jury returned a verdict in her favor. The questions of fact were close; and the Trial Court erroneously instructing on an

issue not presented by the pretrial order, and opposed to a legal presumption and the facts, certainly was prejudicially erroneous. This error was sufficient for a reversal, also the limiting of argument, and comment of the Trial Court as to the testimony of one of plaintiff's witnesses, was highly prejudicial warranting a reversal. Under such circumstances justice requires a reversal.

> "An error in instructing a jury may be raised by an appellate court, when justice seems to require even though it cannot be raised by the appellant."
>
> *Harlem Taxicab Assoc. v. Neuresh,* 191 Fed. 2d 459.

> "But where it is apparent to the appellate court on the face of the record that a miscarriage of justice may occur because counsel has not properly protected his client by timely objection, error which has been waived below may be considered on appeal * * *."
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> *Montgomery v. Virginia Stage Lines,* 191 Fed. 2d 770;
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> *Dowell v. Jowers,* 166 Fed. 2d 214;
>
> *Shokuwan Shimabukuro v. Higeyoshi Nagayama,* 140 Fed. 2d 13.

Dated, Oakland, California,
May 25, 1956.

Respectfully submitted,
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